



March 9, 2022

Andrew Leavitt  
Office of the Chancellor  
University of Wisconsin Oshkosh  
Dempsey Hall, Room 220  
800 Algoma Blvd.  
Oshkosh, Wisconsin 54901

*Sent via U.S. Mail and Electronic Mail (leavitt@uwosh.edu)*

Dear Chancellor Leavitt:

The Foundation for Individual Rights in Education (FIRE), a nonpartisan nonprofit dedicated to defending free speech, freedom of the press, and other essential liberties on America's college campuses, is concerned by the threat to freedom of expression posed by press-related practices at the University of Wisconsin Oshkosh (UWO). This threat arises from the university's practice of requiring members of the press to seek approval from University Marketing and Communications before interviewing university employees, and its related practice of requiring journalists to submit interview questions to University Marketing and Communications via email. These requirements restrict both the expressive rights of university personnel and the free press rights of journalists, including student journalists from the *Advance-Titan* and other media.

I. **UWO has Engaged in a Pattern of Silencing the Student Press by Restricting Access to Campus Voices**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, UWO's media relations practices are inconsistent with the university's First Amendment obligations, and the university must take action to reaffirm its commitment to free expression, including a free press.

UWO does not appear to maintain a written policy on general media relations. Despite this lack of written policy, UWO maintains onerous media relations practices by requiring reporters to reach out to university officials for approval before a university employee may grant interviews. Further, UWO is in the practice of requiring journalists to submit interview questions to campus officials before granting university employees permission to take part in any interview. Employees then send their answers to staff at University Marketing and

Communications who sends the answers to reporters, instead of permitting employees to communicate directly with the press.

Student journalists at the *Advance-Titan*, an independent student newspaper at UWO, have frequently encountered these practices while reporting on campus news. In a September 2020 email, University Marketing and Communications Director Peggy Breister described how “A-T staff must work through UMC regarding any requests for interviews with UWO staff,”<sup>1</sup> indicating that these practices have been in place since at least 2020.

An October 2021 email from Breister affirmed these practices. Breister asked to attend an editorial meeting for the *Advance-Titan* to instruct the paper’s staff on the practices after reporters reached out directly to university employees for interviews.<sup>2</sup>

University Marketing and Communications continues to require reporters from the *Advance-Titan* to abide by this process when seeking interviews with university personnel.<sup>3</sup>

## II. **UWO’s Media Relations Practices are Inconsistent with its Obligations Under the First Amendment**

It has long been settled law that the First Amendment is binding on public colleges like UWO.<sup>4</sup> The Supreme Court has made clear that its jurisprudence “leave[s] no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”<sup>5</sup>

### A. ***UWO’s Press Practices Impose an Unconstitutional Prior Restraint on Speech***

By requiring journalists to submit all requests for interviews with university personnel and interview questions to University Marketing and Communications, UWO stifles not only the voice of the student press, but also the expressive rights of its faculty and staff.

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<sup>1</sup> Email from Peggy Breister to Carter Uslabar (Sept. 15, 2020, 4:19 P.M.) (on file with author).

<sup>2</sup> Email from Peggy Breister to Barbara Benish (Oct. 19, 2021, 11:04 A.M.) (on file with author).

<sup>3</sup> Email from Natalie Johnson to Cory Sparks (Feb. 17, 2022, 11:41 A.M.) (on file with author).

<sup>4</sup> *Healy v. James*, 408 U.S. 169 (1972) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

<sup>5</sup> *Healy v. James*, 408 U.S. at 180; *see also Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (holding that, with regard to faculty expression, academic freedom “is of transcendent value to all of us and not merely to the teachers concerned” and therefore is a “special concern of the First Amendment”).

**i. University employees retain a First Amendment right to speak to media on matters of public concern.**

Under the First Amendment, government employers may not punish employees for speaking on matters of public concern in their capacity as private citizens.<sup>6</sup> A state educational institution may punish employee expression, including interviews with members of the news media, only if the institution shows, among other things, that the employee’s speech had a substantial and material negative impact on the “regular operation” of the university.<sup>7</sup> If the university cannot show this, then “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public,” and the employee’s speech is protected by the First Amendment.<sup>8</sup> Moreover, the expressive rights of faculty are even broader, as many courts have declined to apply the traditional *Garcetti-Pickering* analysis to faculty members’ speech, instead finding that faculty’s right to speak publicly is protected by academic freedom.<sup>9</sup>

Thus, absent a demonstration that the conversations have a substantial negative impact on UWO’s educational operations, UWO may not punish faculty and staff for speaking to journalists without approval of University Marketing and Communications or other campus officials, and UWO’s practice of requiring as much consequently cannot constitutionally be enforced.

**ii. Requiring approval before speaking to journalists imposes a prior restraint on employee speech.**

Further, UWO’s practice of requiring interview requests to be approved by campus officials is not simply a means of punishing employees’ speech; it is also a prior restraint on the free expression of university personnel.<sup>10</sup> Where a policy or practice acts as a prior restraint on government employee speech, the government employer bears an even heavier burden than in instances of *post hoc* punishment of employees’ speech.<sup>11</sup> This is because, “unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens.”<sup>12</sup>

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<sup>6</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>7</sup> *Id.* at 568, 573.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (“We hold that *Garcetti* does not apply to ‘speech related to scholarship or teaching’”); *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (“Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.”); see also *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

<sup>10</sup> Per our mission, FIRE defends student and faculty rights. Impeding the relationship between university staff and student journalists is detrimental to the free press rights of the student media.

<sup>11</sup> *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 468 (1995).

<sup>12</sup> *Id.*

Policies and practices that bar faculty and staff from speaking to journalists, including student journalists, impose a prior restraint on speech. Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.”<sup>13</sup> Practices that require individuals to seek approval from officials before speaking are “offensive—not only to the values protected by the First Amendment, but to the very notion of a free society.”<sup>14</sup> UWO cannot condition employees’ communication with members of the media, including student media, on an administrator’s prior approval. This practice impermissibly burdens the First Amendment rights of those subject to it.

In order to justify a prior restraint on speech by government employees, including employees of public universities, the government entity must demonstrate “reasonable ground to fear that serious evil will result if free speech is practiced[,]” that these “recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>15</sup> In cases considering blanket prior restraints on government employee speech, courts have consistently struck down such bans as violative of the First Amendment.<sup>16</sup>

### ***B. UWO’s Practices Inhibit the Student Press From Exercising Its Role as a Campus Watchdog***

The right of government employees to speak freely, including to speak freely to the media, finds a close corollary in the public’s right to know. As the Supreme Court has observed, blanket infringements on the speech of government employees “also impose[] a significant burden on the public’s right to read and hear what Government employees would otherwise have written and said.”<sup>17</sup>

The press, including the student press, is an important conduit for the public’s right to know. Courts have recognized that members of the press act as “surrogates for the public” in keeping a watchful eye on the operations of government.<sup>18</sup> Thus, obstructing journalists’ access to UWO personnel not only violates employees’ right to speak out, but also violates the public’s right to know about UWO’s operations, a process which usually occurs through the press. As members of the campus community, student journalists are an important part of the

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<sup>13</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>14</sup> *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

<sup>15</sup> *NTEU*, 513 U.S. at 475 (first quoting *Whitney v. California*, 274 U.S. 357, 376 (1927); and then *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994)).

<sup>16</sup> See, e.g., *Harman v. City of New York*, 140 F. 3d 111, 116 (2d Cir. 1998) (striking down a policy requiring that “[a]ll contacts with the media regarding any policies or activities of the Agency” be referred to Media Relations); *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981) (holding unconstitutional an overbroad employee speech policy). For further discussion of government employee ban cases, see *Protecting Sources and Whistleblowers: The First Amendment and Public Employees’ Right to Speak to the Media*, BRECHNER CENTER FOR FREEDOM OF INFORMATION, Oct. 7, 2019, <http://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf>.

<sup>17</sup> *NTEU*, 513 U.S. at 470; see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (it is “well established” that freedom of expression “protects the right to receive information and ideas”).

<sup>18</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

process of informing the public of the undertakings of government officials at public colleges and universities.

Further, requiring UWO student journalists to submit interview questions prior to authorization of interviews with campus personnel is functionally equivalent to prior review, in that it gives university officials potentially intimate context about a story that would not otherwise be available before publication. Similar to traditional cases of prior review, wherein a university requires student journalists to submit content to school officials before publication, UWO's interview practices allow the university to review much of the content of a particular story before publication by allowing officials to review questions and employees' proposed answers before they are given to reporters. Because information and quotes garnered through interviews often create much of the content of specific stories, knowing the questions journalists will ask and the answers they will receive gives UWO officials a similar power to control the message as universities that engage in traditional prior review.

Prior review is often the first step toward prior restraint. While UWO's interview practices may not result in the university explicitly barring student media from covering specific topics, it may result in what media law experts have referred to as "censorship by starvation," in which university officials restrain content by denying student journalists access to information they need to responsibly report on a story.<sup>19</sup>

As a direct result of UWO's practices, lack of access to university personnel has come to burden student journalists' ability to cover important campus issues. Blocking access is not only contrary to freedom of expression, but it is also unwise, casting into doubt the university's commitment to transparency regarding campus decisions and events, which—because UWO is a public university—affect its immediate community and the broader public.

UWO may require that official statements published on behalf of the institution itself come only through University Marketing and Communications, and it may offer to field requests from journalists on behalf of willing employees. It cannot, however, effect a prior restraint on employees' interactions with student journalists and other reporters, nor may it enact prior review of student journalists' unpublished materials, without violating the First Amendment.

### III. Conclusion

The unique role of public universities as "peculiarly the 'marketplace of ideas,'" cannot be squared with burdens on journalists' right to seek information and employees' right to share that information.<sup>20</sup>

To reaffirm its commitment to free expression, UWO must institute policies on media relations that make clear that members of the press, including the student press, are free to speak with university personnel in their capacity as individual citizens without a requirement that university officials review interview questions before an interview is granted. Further,

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<sup>19</sup> Frank LoMonte, *Journalists Have Help in the Fight for Access to Information*, QUILL & SCROLL, Oct. 31, 2017, <https://quillandscroll.org/5252/uncategorized/journalists-have-help-in-the-fight-for-access-to-information>.

<sup>20</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

UWO must ensure that its employees are trained in practices that comply with these policies and the First Amendment.

We request a response to this letter no later than the close of business on March 23, 2022.

Sincerely,

A handwritten signature in cursive script that reads "Anne Marie Tamburro".

Anne Marie Tamburro  
Program Officer, Individual Rights Defense Program

Cc: Peggy Breister, Executive Director, University Marketing and Communications  
Natalie Johnson, Director of Communications, University Marketing and  
Communications